



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 47 OF 2019**

**JULIET WAMIRI .....CLAIMANT/RESPONDENT**

**VERSUS**

**JAMES R. NJENGA, HON. STEWARD MADZAYO & OTHERS (Sued as registered Trustees of  
Agricultural Society of Kenya).....RESPONDENT/APPLICANT**

**RULING**

The ruling herein relates to the Respondents' application dated 6<sup>th</sup> August 2021. It seeks the following orders :

1. *The amended Statement of Claim be and is hereby struck out.*
2. *The costs of this application be borne by the Claimant.*

This Application is premised on the grounds **THAT**:

- (i) *Vide ruling delivered on 27<sup>th</sup> October, 2020 leave of court was granted to the Claimant to file an amended Statement of Claim.*
- (ii) *Despite being granted leave to file the amended statement of Claim, the Claimant only filed the amended claim on 2<sup>nd</sup> March, 2021 and served upon the Respondent on 4<sup>th</sup> March, 2021.*
- (iii) *The claimant failed to file her amended statement of claim within the statutory time limits on amendment of pleadings; consequently the order granting leave lapsed and is of no effect.*
- (iv) *That no prejudice can be suffered by the Claimant if this application is allowed.*
- (v) *It is in the overriding interests of justice, protection of the sanctity and integrity of the court and the proper administration of justice that the orders sought in this application are granted.*

The Application is supported by the supporting Affidavit of **BATRAM MUTHOKA**, who avers that the Claimant has failed to comply with the provisions of Order 8 rule 6 of the Civil Procedure Rules, 2010 limiting timelines for purposes of effecting an amendment of a pleading. That while the window upon grant of leave to file an amended Pleading is fourteen days, the Claimant filed her statement four months after grant of leave and as such the Amended statement of Claim ought not to be entertained by this Court and should be struck out.

The Claimant in reply filed the Replying Affidavit of **GEORGE OGEMBO**, advocate on record and who avers that the Claimant was indeed granted leave to file an amended Statement of Claim vide the Court's ruling delivered on 27<sup>th</sup> October 2020. He states that the court did not give a definite period for filing of the Amended Statement of Claim and that the implication under the Employment and Labour Relations Court (Procedure) Rules would be that the same ought to be filed within a reasonable period.

He further avers that the order coincided with the date his firm was moving offices. That in that process the movers misplaced some files and he was only able to trace the present file on 26<sup>th</sup> February 2021. Upon realizing that the amended claim was yet to be filed in court, he immediately filed and served it upon the Respondent/Applicant. The Respondent has not proved the prejudice that it is likely to suffer which cannot be compensated by award of costs. That on the other hand, the amendment raises grave issues touching on violations of fair labour

practices in the workplace and it will heavily prejudice the Claimant if the issues are not heard on merit on account of excusable mistake by counsel.

The application was disposed of by way of written submissions.

The Respondent submitted that the Claimant was in violation of Order 8, rule 6 of the Civil Procedure Rules which requires a party to amend its pleadings within fourteen days failure to which the orders granting such leave cease to have effect. Further that the Claimant has not sought or moved the court by way of any application seeking to extend the said orders issued on 27<sup>th</sup> October, 2020.

Counsel further submitted that the continued inordinate delay caused by failure to comply with the Order 8 Rule 6 of the Civil Procedure Rules has caused immense prejudice upon the Respondent on the grounds of a suit pending in court awaiting amendment of pleadings. He relies on the case **Rupa Cotton Mills (EPZ) Limited & 2 others v Bank of Baroda (K) Limited [2014] eKLR** the court when dealing with a similar issue stated that failure by the court to penalise the Applicant for its omission would be a great miscarriage of justice against the Respondents. Counsel submits that the amended claim herein is improperly on record and should be struck out with costs.

The Claimant through submitted that the instant application has no legal basis as it's based on rules that are not applicable to employment disputes. The relevant proviso is **Rule 14(6)** of the ELR Court (Procedure) Rules, 2016 which provides that upon being granted leave to amend, the corresponding party has a corresponding right to equally amend its pleadings. That Civil Procedure Rules can only be employed in employment disputes when it comes to enforcement of Judgement, award, order or Decree of the Court.

Counsel further submits that the Claimant has offered a genuine and reasonable explanation for that delay in that it was occasioned by the fact that the file had been misplaced when counsel was moving offices. Counsel relies on the decided case of **Andrew Kiplagat Chemarino v Paul Kipkorir Kibet [2018] eKLR** where the court stated;

*The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.*

Counsel submits that the Respondent has not identified the prejudice they are likely to suffer if the amended claim is allowed. That the Respondent/Claimant still has the opportunity to file a response to the amended claim. That on the other hand, the amendments raised are grave and it would be prejudicial to issue orders striking out the amended claim.

Lastly, counsel submits that the power to strike out pleadings is a purely discretionary power which should be exercised in the interest of justice. Counsel cites the case of **Francis Ndwigah Nyagah v Transchem Pharmaceuticals Limited [2021] eKLR** where the court held that;

*...in an application of this nature where the orders sought by the Applicant/Claimant are discretionary, it behooves the Court to strike a balance between the interest of the Claimant to access justice without undue delay and those of the Respondent to be afforded the opportunity to ventilate its case on the disputed facts. The balance is decipherable from the documents on record, grounds relied upon by the parties, submissions and the law. In the instant case, the balance is tilted in favour of hearing both parties and determining the cause on its merits.*

Having carefully considered the pleadings, evidence, submissions and authorities cited by the parties, the single issue arising for determination is whether the Applicant is entitled to the reliefs sought.

Section 3(1) of the Employment And Labour Relations Court , 2011 provides that its principal objective is to enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes. Section 20(1) obligates the Court to act without undue regard to technicalities. The same is stipulated under Article 159 (2) (d) of the Constitution of Kenya 2010.

In **Rupa Cotton Mills (EPZ) Limited & 2 others v Bank of Baroda (K) Limited [2014] eKLR** , the case relied on by the Applicant herein, the court when allowing an application seeking for extension of time to file an amended defence and counter claim stated as follows:

*The court must be very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny a party leave to amend its pleadings as a last resort and with good or sufficient cause. This is where the other party will suffer great prejudice which cannot be compensated by way of costs or otherwise as may be just.*

In the instant case, it is indeed true that there was a delay by the Claimant/Respondent in filing the amended Claim. However, it is trite that this court is clothed with inherent powers to exercise its discretion to ensure the ends of justice are met. The reason advanced by the Claimant's counsel is plausible. It would be unjust to lock out the Claimant based on a mistake by her advocate. Further, allowing the amended claim will not prejudice the Respondent/Applicant in any way whatsoever as the Respondent still has the opportunity to respond to the amended Claim.

**As stated above this court's main objective is to deliver justice without regard to technicalities. Accordingly, the application dated 6<sup>th</sup> August 2021 is found without merit and is hereby dismissed.**

**Costs shall be in the cause.**

**Delivered in court at Nairobi this 20<sup>th</sup> day of December, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....